

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAVID RHODES,

Plaintiff,

v.

CITY OF FEDERAL WAY, et al.,

Defendants.

Case No. C09-265MJP

**ORDER GRANTING IN PART AND
DENYING IN PART SUMMARY
JUDGMENT**

This matter comes before the Court on Defendant City of Federal Way's ("Federal Way") motion for summary judgment (Dkt. No. 35) and Defendant SCI Infrastructure, LLC's ("SCI") motion for summary judgment (Dkt. No. 31). Having reviewed the motions, Plaintiff's responses (Dkt. Nos. 41, 42), Defendants' replies (Dkt. Nos. 43, 45), and all papers submitted in support thereof, the Court GRANTS in part and DENIES in part Federal Way's motion and GRANTS in full SCI's motion for summary judgment. The Court GRANTS in part and DENIES in part Defendants' unopposed motions to strike contained in SCI's reply brief. (Dkt. Nos. 43 at 4, 45 at 2-3.)

Background

In 2006, Federal Way sought to enlarge Highway 99, which Plaintiff's strip mall abuts. To accomplish the enlargement, Federal Way required taking an eight-and-a-half foot portion of

1 Plaintiff's strip mall. Federal Way filed an eminent domain action against Plaintiff in King
2 County Superior Court. The parties eventually settled the action and, as set forth in a settlement
3 agreement, Plaintiff conveyed the eight-and-a-half foot strip to Federal Way for \$236,000 and
4 several improvements to his strip mall.

5 Through the settlement agreement, Federal Way promised to rebuild a storm drain system
6 on Plaintiff's property, replace the asphalt and curbs in Plaintiff's parking lot, and do other
7 incidental work on his property. (Smith Decl. Ex. 2.) Federal Way agreed to complete "all the
8 improvements within Rhodes' parking lot area" within 120 days of commencing work. (Smith
9 Decl. Ex. 2 at 3.) As part of the settlement, Plaintiff gave Federal Way and SCI a right of entry
10 onto the property to complete this construction. (Smith Decl. Ex. 2 at 41.) The right of entry
11 "commence[d] at such time as the City of Federal Way issue[d a] NOTICE TO PROCEED to the
12 prime contractor" which would end "at the completion of the Project." (Id.) The "Project" refers
13 to the expansion of Highway 99, not just the improvements to Plaintiff's property. (Id.) Federal
14 Way sent the Notice to Proceed to Plaintiff, and established May 1, 2007 as the date the right of
15 entry was triggered. (Roberts Decl. Ex. 1. at 1.) Plaintiff authorized SCI to be on the property at
16 all times through the right of entry. (Dkt. No. 32 Ex. 3.)

17 SCI began work on Plaintiff's property on August 20, 2007. Federal Way contends that
18 the 120 day work period set out by the settlement agreement began on August 15, meaning that
19 construction was to end on December 12, 2007. (Dkt. No. 35 at 5.) Plaintiff does not dispute
20 this. Work was not complete within 120 days. As of December 14, 2007, there were eleven
21 outstanding items to be completed, including final paving of part of one of the driveways, some
22 landscaping, and striping in the parking lot. (Roberts Decl. Ex. 4 at 4.) Plaintiff stated in his
23 deposition that he believed the work was completed in February, 2008. (Dkt. No. 32-2 at 3.)
24 Plaintiff submits that the paving of the driveway and asphalt parking area was defective because
25 the asphalt was not compressed sufficiently and has unraveled in places. (Rhodes Decl. ¶ 10.)
26 Federal way has admitted that the paving was defective. (Rhodes Decl. Ex. E.) On January 11,

1 2008, Plaintiff filed a claim for \$100,000 with the City for lost rents as a result of the
 2 construction. (Smith Decl. Ex. 4.) As of January 18, 2008, there were six items remaining.
 3 (Roberts Decl. Ex. 4 at 7.) As of February 1, 2008, there were only two items left. (Id. at 8.)

4 Unrelated to the construction project, Plaintiff has had several disputes with Federal Way
 5 regarding zoning and code enforcement at his strip mall. Plaintiff leases some of the units to
 6 churches, although the property is not zoned for such use. Starting in 2006, Federal Way
 7 brought code enforcement actions against Plaintiff for this improper zoning use. (Smith Decl.
 8 Ex. 6.) In 2006, Federal Way and Plaintiff briefly litigated the issue and Plaintiff was found in
 9 violation. (Id.) In 2008, Federal Way reinvestigated and found continuing violations. (Id.)
 10 Plaintiff appealed and the zoning enforcement was found valid. (Id.)

11 Plaintiff filed a lawsuit in King County Superior Court on February 3, 2009. Plaintiff
 12 asserts four causes of action against both Defendants: (1) Interference with quiet
 13 enjoyment/Trespass; (2) Inverse condemnation/Taking under state and federal law; (3) Breach of
 14 settlement agreement; and (4) Tortious interference with a business relationship. (Compl. ¶¶ 4.1-
 15 4.20.) Defendants removed the case to this Court, and now move for summary judgment.
 16 Federal Way has asserted a cross claim against SCI, which has been severed from Plaintiff's
 17 claims. (See Dkt. Nos. 18, 28.)

18 Analysis

19 A. Standard

20 Summary judgment is appropriate when, viewing the evidence in the light most favorable
 21 to the nonmoving party, there exists "no genuine issue as to any material fact" such that "the
 22 moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Genuine issues
 23 of material fact are those for which the evidence is such that "a reasonable jury could return a
 24 verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).
 25 Because a mere scintilla of evidence is insufficient to create a factual dispute, the non-moving
 26 party must set forth specific facts demonstrating a genuine issue of fact for trial. Id. at 252. In

1 ruling on summary judgment, the court does not weigh evidence to determine the truth of the
 2 matter, but “only determine[s] whether there is a genuine issue for trial.” Crane v. Conoco, Inc.,
 3 41 F.3d 547, 549 (9th Cir. 1994). The Court notes that Federal Way urges the Court to employ
 4 the following standard: that “plaintiff must present enough competent evidence to overcome the
 5 defendant’s existing evidence, in order to be entitled to summary judgment.” (Dkt. No. 35 at
 6 18.) This is an incorrect statement of law that the Court does not adopt.

7 B. Interference with Quiet Enjoyment/Trespass

8 Defendants move to dismiss Plaintiff’s quiet enjoyment/trespass claim. (Dkt. Nos. 31 at
 9 4-5, 35 at 9-11.) Plaintiff makes no response and raises no genuine issue of disputed fact that
 10 precludes summary judgment.

11 Although Plaintiff’s first claim is titled “interference with quiet enjoyment,” the Court
 12 treats it as one for trespass. A quiet enjoyment claim generally requires that a lease govern the
 13 relationship between the parties. See Cherberg v. People’s Nat’l Bank of Wash., 15 Wn. App.
 14 336, 343 (1976), rev’d on other grounds, 88 Wn.2d 595 (1977). There is no lease at issue
 15 between the parties and Plaintiff has neither briefed the issue nor offered any evidence
 16 contradicting the evidence submitted by Defendants. While this alone is fatal to Plaintiff’s
 17 claim, Plaintiff appears to have pleaded the claim as one for continuing trespass. (Compl. ¶¶ 4.3-
 18 4.5.) Trespass is an interference with the right to exclusive possession of property. Grundy v.
 19 Brack Family Trust, 151 Wn. App. 557, 566 (2009). Intentional trespass occurs only where there
 20 is “(1) an invasion of property affecting an interest in exclusive possession, (2) an intentional act,
 21 (3) reasonable foreseeability that the act would disturb the plaintiff’s possessory interest, and (4)
 22 actual and substantial damages.” Id. at 567 (quoting Wallace v. Lewis County, 134 Wn. App. 1,
 23 15, (2006)). Consent to enter on the land of the plaintiff is a complete defense. Restatement
 24 (Second) of Torts § 167 (1965).

25 Plaintiff’s trespass claim fails because he consented to have Federal Way and SCI enter
 26 onto his land through the right of entry he executed. At his deposition, Plaintiff admitted that he

1 never revoked the right of entry. (Dkt. No. 32, Ex. 1.) The right of entry was in force
 2 throughout the entire period of construction, and all entry onto Plaintiff's land was with full
 3 consent. The Court DISMISSES Plaintiff's claim and GRANTS Defendants' motions.

4 C. Inverse Condemnation/Taking

5 Defendants move to dismiss Plaintiff's Section 1983 takings claim, which is premised on
 6 the Washington State and United States Constitutions. (Dkt. Nos. 31 at 5, 35 at 11-12.) Plaintiff
 7 does not respond to the motions and no dispute of fact precludes granting Defendants the relief
 8 they seek.

9 As an initial matter, Plaintiff's claim is improperly drafted. Plaintiff alleges that "the
 10 WSDOT, their [sic] agents and employees," caused a taking of his land. (Compl. ¶ 4.9.)
 11 WSDOT is not a party to this case. Plaintiff does not allege that any other party named in this
 12 suit caused a taking. The alone is fatal to the claim. The Court considers briefly the merits.

13 A "taking" occurs when government conduct interferes with the use and enjoyment of
 14 private property, with a subsequent decline in market value. Martin v. Port of Seattle, 64 Wn.2d
 15 309, 320 (1964). The term "inverse condemnation" is used to describe an action alleging a
 16 governmental "taking," brought "to recover the value of property which has been appropriated in
 17 fact, but with no formal exercise of the power." Id. at 310 n.1. The elements of inverse
 18 condemnation are: "(1) a taking or damaging (2) of private property (3) for public use (4)
 19 without just compensation being paid (5) by a governmental entity that has not instituted formal
 20 proceedings." Phillips v. King County, 136 Wn.2d 946, 957 (1998). To establish a violation of
 21 the Fifth Amendment of the United States Constitution, the plaintiff must show that the City
 22 deprived him of a property interest without due process. See Parratt v. Taylor, 451 U.S. 527,
 23 536-37 (1981), overruled on other grounds, Daniels v. Williams, 474 U.S. 327 (1986).

24 Plaintiff's claims against Defendants fail because he has not demonstrated any
 25 deprivation of property or economic use of his land. Federal Way fully compensated him for the
 26 eight-and-a-half foot strip of land and agreed to provide certain improvements over a 120 day

1 period. While the construction exceeded 120 days, there is no evidence this caused Plaintiff to
2 suffer any loss of his property or loss of financial use of his property. Deposition testimony
3 shows that the property was always accessible and that there was parking for customers and
4 tenants, in spite of the defective pavement. (Rhodes Dep. at 113-17.) Additionally, SCI is not a
5 governmental entity and Plaintiff has failed to produce any argument or facts as to how SCI
6 might be liable under § 1983 or inverse condemnation. This alone is fatal to Plaintiff's claim
7 against SCI. Plaintiff's takings claim is DISMISSED and Defendants motions are GRANTED.

8 D. Breach of Settlement Agreement

9 SCI contends that it was not a party to the settlement agreement and is therefore not
10 liable. (Dkt. No. 31 at 5.) A party asserting a breach of a settlement agreement must satisfy the
11 traditional elements of a breach of contract claim. Trotzer v. Vig, 149 Wn. App. 594, 605
12 (2009). A breach of contract is actionable if the contract imposes a duty, the duty is breached,
13 and the breach is a proximate cause of damage to the claimant. N.W. Indep. Forest Mfrs. v.
14 Dep't of Labor & Indus., 78 Wn. App. 707, 712 (1995). Generally, only a party to a contract
15 may be sued for breach. See Torgerson v. One Lincoln Tower, LLC, 116 Wn.2d 510, 517
16 (2009); Trotzer, 149 Wn. App. at 605. Plaintiff offers no basis on which to conclude SCI is a
17 party to the settlement agreement or is otherwise bound by its terms. The Court finds no basis to
18 hold SCI liable for breach. SCI's motion is GRANTED and the claims against it DISMISSED.

19 Federal Way admits it breached the settlement agreement, but moves for summary
20 judgment on the basis that Plaintiff suffered no lost rental income or damages as a result of the
21 construction overrun. (Dkt. No. 35 at 17-20.) Plaintiff has not produced any evidence of lost
22 rental income that resulted from the construction overrun and Federal Way is entitled to relief on
23 this portion of the breach of contract claim. However, a question of fact remains as to the
24 damages Plaintiff suffered due to the paving defects—an issue on which Federal Way has not
25 moved for summary judgment.

Before reaching the merits of Federal Way's motion, the Court must first address Defendants' motion to strike. Plaintiff does not respond to Defendants' motion, which may be considered an admission the motion has merit. See Local Rule CR 7(b)(2). Defendants move to strike paragraphs four and eight of Plaintiff Rhodes' declaration that they assert contain inadmissible hearsay. (Dkt. Nos. 43 at 4, 45 at 2-3.) Rhodes testifies in paragraph four, lines four to six and paragraph eight, lines three to five as to the mental state of several of his tenants, which is inadmissible hearsay.¹ See Fed. R. Evid. 801, 802, 803. These statements are STRICKEN and will not be considered.² The Court also STRIKES in part paragraphs twelve and thirteen to the extent that they contain evidence of forensic expert testimony, which the Court previously barred Plaintiff from using. (See Dkt. No. 27.) However, the Court considers the statements in these paragraphs to the extent that they show there is some cost that is required to fix the defective pavement. Defendants move to strike German Martinez's declaration, arguing that he has no personal knowledge of why his church left Rhodes' property because he was not the lease-holder. The motion is DENIED. Mr. Martinez purports to have personal knowledge because he is on the Board to Regence of a church that leased a space from Rhodes. (Martinez Decl. ¶ 1.) There is no reason why Mr. Martinez may not opine on issues for which he has personal knowledge, regardless of whether he is the officially-named lease-holder. Defendants also move to strike the declaration of James Dore, Jr., Plaintiff's attorney. (Dkt. No. 45 at 3.) The Court STRIKES paragraph ten of Mr. Dore's declaration, in which he makes legal conclusions masquerading as statements of fact. Mr. Dore has not demonstrated how he has

¹ For example, Plaintiff states that Pastor Sag Filipino left his property because he was "upset with the project as it lingered from February through July, 2008." (Id. ¶ 4.) This is not only hearsay, but it is also contradicted by a letter from Pastor Filipino in which the Pastor explains to Plaintiff that the reason for leaving was due to "the City of Federal Way continuously harassing and posting notice to vacating [sic] us from the premises." (Dkt. No. 44 at 23.) There is no mention of construction as a reason for Pastor Filipino's departure.

² Even if the Court were to consider this evidence, it would not change the Court's decision as to Plaintiff's lost rents portion of his claim.

1 personal knowledge of whether Plaintiff's tenants were harassed or intimidated, or why they left
2 Plaintiff's property. The Court will not consider this statement.

3 Considering the admissible evidence, the Court finds no facts supporting Plaintiff's claim
4 that he lost rental income due to the construction overrun. Plaintiff states that one church did not
5 renew its lease in February 2008, but there is no evidence as to why this church did not renew its
6 lease. (Rhodes Decl. ¶ 7.) No other tenant is alleged to have left as a direct result of the project
7 overrun. German Martinez's declaration also fails to create a factual dispute barring summary
8 judgment. Mr. Martinez states that one of the "contributing factor[s]" to the church's departure
9 was "the City's contractor repeatedly occupied portions of the parking lot area leaving little or no
10 parking spaces for the church members, such that they would have to park off the premises."
11 (Martinez Decl. ¶ 7.) This statement does not show that the departure was in any way tied to the
12 overrun, as distinct from the construction. To the contrary, Mr. Martinez explains that main
13 reasons the Church left was because the building was not properly zoned for church use. (Id. ¶
14 6.)

15 Federal Way produces evidence that at the beginning of the project Plaintiff complained
16 that he started losing tenants. Brian Roberts, the City's project engineer, received complaints as
17 early as September 17, 2007 that Plaintiff was losing tenants. (Roberts Decl. ¶ 11.) Plaintiff
18 complained to Mr. Roberts again on October 7, 2007 that he lost five tenants as a result of the
19 construction. (Id. ¶ 12.) There is no other record of similar complaints after December 12, 2007,
20 the date when the project should have been completed. The evidence contains no evidence that
21 Plaintiff lost tenants from the construction overrun as distinct from the project itself. Plaintiff
22 has not created a factual dispute and Federal Way's motion on this aspect of Plaintiff's claim is
23 GRANTED.

24 Federal Way has not, however, demonstrated an absence of factual dispute as to whether
25 Plaintiff suffered damages due to the defective paving at his strip mall. Construing the complaint
26 and facts in Plaintiff's favor, the Court finds that a genuine issue remains as to how much, if

1 anything, Plaintiff has suffered as a result of Federal Way's admitted breach of contract
2 regarding the defective paving. This issue must be resolved by a fact finder.

3 Plaintiff's claim as to lost rental income is DISMISSED. Federal Way's motion as the
4 claim based on damages tied to the defective pavement is DENIED.

5 E. Tortious Interference

6 Defendants move to dismiss Plaintiff's tortious interference claim on the basis that there
7 is no evidence that either party acted towards Plaintiff with an improper motive or means.
8 Defendants are entitled to relief.

9 Tortious interference with a business or contractual relationship requires Plaintiff to
10 satisfy five elements: "(1) the existence of a valid contractual relationship or business
11 expectancy; (2) knowledge of their relationship or expectancy on the part of the interferer; (3)
12 intentional interference inducing or causing a breach or termination of the relationship or
13 expectancy; (4) that defendants interfered for an improper purpose or used improper means; and
14 (5) resultant damage." Leingang v. Pierce Co. Med. Bureau, Inc., 131 Wn.2d 133, 157 (1997).
15 Plaintiff must demonstrate an intent to interfere with for an improper purpose or by use of
16 improper means. Pleas v. City of Seattle, 112 Wn.2d 794, 804 (1989).

17 Defendants have shown that they did not interfere with Plaintiff's business for an
18 improper purpose or through improper means, and Plaintiff raises no dispute of fact precluding
19 relief. Plaintiff expressly permitted SCI and Federal Way to enter on his land to execute the
20 settlement agreement and make certain improvements to the land. There is no evidence that the
21 project overrun was the result of any nefarious plot or malevolent intent. Federal Way's project
22 engineer, Brian Roberts, states that he worked with Plaintiff to address all of his complaints and
23 that he agreed with the need to repair the defective pavement. (Roberts Decl. ¶¶ 10-22.) Mike
24 Scoccolo, the manager of SCI, states that he tried to work with Plaintiff and "minimize any
25 inconvenience to the tenants so that the landlord tenant relationship between Plaintiff and his
26 tenants would remain intact." (Scoccolo Decl. ¶ 5.) Plaintiff points to no facts of any improper

1 motive or means with regard to the work performed on his property that could satisfy this
2 element of his claim.

3 Federal Way has also demonstrated that no facts support Plaintiff's claim that the City's
4 code enforcement was undertaken for an improper purpose or through improper means.³
5 Plaintiff states that many of his church tenants were upset when code enforcement agents came
6 to enforce the zoning code and that some of those tenants left. (Rhodes Decl. ¶¶ 4, 8.) He points
7 to no evidence that the enforcers acted out of an improper means or motive. Federal Way points
8 to undisputed evidence that it sought to enforce the zoning code because the strip mall lacked
9 proper safety measures and other aspects to qualify for an "assembly" space under Federal
10 Way's zoning code. (Smith Decl. Ex 6.) Enforcement throughout 2008 was lawful, even though
11 Plaintiff appealed the decision. As the Hearing Examiner's report sets forth, the enforcement
12 proceedings in 2008 were routine and served the City's interest in making sure the buildings
13 were safe. (Id.) Plaintiff's opposition relies on Mr. Martinez's statement that Federal Way
14 "repeatedly and constantly harassed the tenants of Suite N." (Martinez Decl. ¶ 3.) Mr. Martinez
15 explains that Federal Way "often appeared on the property claiming the tenant was in violation
16 of City code" and that "[i]t was our position that the tenant was not in violation of any City
17 code." (Id. ¶¶ 3-4.) Mr. Martinez's declaration evidences nothing more than the fact that he
18 disagreed with the enforceability of the code and found the City's action objectionable. This
19 does not raise a genuine issue of fact as to Federal Way's intent because there is no
20 particularized evidence to substantiate Plaintiff's claim. See Anderson, 477 U.S. at 252.

21 The Court GRANTS Defendants' motions on this issue and DISMISSES Plaintiff's
22 tortious interference claim.

23
24
25 ³ Plaintiff admits that there is no connection between the overrun of the project and the code
26 enforcement. (Dkt. No. 43 at 10.)

Conclusion

The Court GRANTS SCI's motion for summary judgment in full. SCI has demonstrated an entitlement to relief in the absence of any disputed issues of material fact. The Court GRANTS Federal Way's motion for summary judgment on Plaintiff's trespass, takings, and tortious interference claims. The Court GRANTS in part and DENIES in part Federal Way's motion for summary judgment on Plaintiff's breach of settlement agreement claim. Plaintiff's claim for damages caused by the defective paving contains disputed issues of fact that preclude summary judgment.

The Clerk shall transmit a copy of this Order to all counsel of record.

Dated this 16th day of March, 2010.



Marsha J. Pechman
United States District Judge